Supreme Court, U.S.
FILED
NOV 25 1991
OFFICE OF THE CLERK

No. 91-1947

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

JOHN K. YEE and IRENE S. YEE, et al.,
Petitioners,
vs.
CITY OF ESCONDIDO,
Respondent.

ON WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
FOURTH APPELLATE DISTRICT, DIVISION ONE

BRIEF *AMICUS CURIAE* OF CALIFORNIA MOBILE HOME PARKOWNERS ALLIANCE IN SUPPORT OF PETITIONERS

PROF. GEORGE LEFCOE
UNIV. OF SOUTHERN
CALIF. LAW CENTER
University Park
Los Angeles, CA 90089
(213) 740-0148

JOEL G. HIRSCH
Law Offices of
DAVID A. LAPIN
10100 Santa Monica Blvd.
Los Angeles, CA 90067
(310) 556-0833

MICHAEL M. BERGER
Counsel of Record
of BERGER & NORTON
A Law Corporation
1875 Century Park East
Suite 600
Los Angeles, CA 90067
(310) 788-1700

Attorneys for Amicus Curiae

No. 91-1947

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

JOHN K. YEE and IRENE S. YEE, et al.,
Petitioners,
vs.
CITY OF ESCONDIDO,
Respondent.

ON WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
FOURTH APPELLATE DISTRICT, DIVISION ONE

BRIEF *AMICUS CURIAE* OF CALIFORNIA MOBILE HOME PARKOWNERS ALLIANCE IN SUPPORT OF PETITIONERS

PROF. GEORGE LEFCOE
UNIV. OF SOUTHERN
CALIF. LAW CENTER
University Park
Los Angeles, CA 90089
(213) 740-0148

JOEL G. HIRSCH
Law Offices of
DAVID A. LAPIN
10100 Santa Monica Blvd.
Los Angeles, CA 90067
(310) 556-0833

MICHAEL M. BERGER
Counsel of Record
of BERGER & NORTON
A Law Corporation
1875 Century Park East
Suite 600
Los Angeles, CA 90067
(310) 788-1700

Attorneys for Amicus Curiae

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	3
FACTUAL SUMMARY	7
ARGUMENT	10
"THE POLITICAL ETHICS REFLECTED IN THE FIFTH AMENDMENT REJECT CONFISCATION AS A MEASURE OF JUSTICE."	10
A A Complete Takeover of Property Would Unarguably be a Taking	10
B A Compelled Transfer of a Recognizable Interest in Property is a Taking	13
C A Taking Occurs When Government Commands a Property Owner to Stand Aside and Permit Permanent Physical Occupation of Property by Another	15

Page

THE KIND OF MOBILE HOME RENT CONTROL ORDINANCES BEFORE THIS COURT FAIL TO SUBSTANTIALLY ADVANCE A LEGITIMATE STATE INTEREST 17

A Rent/Vacancy Control Harms the Park Owner and Does Not Protect the Incoming Tenant 19

B Rent/Vacancy Control is Not Needed to Protect the Departing Tenant 21

HOW FAR IS "TOO FAR"? 24

CONCLUSION 29

TABLE OF AUTHORITIES

Page

Cases

Arverne Bay Constr. Co. v. Thatcher (N.Y. 1938)15 N.E.2d 587 12

Azul Pacifico, Inc. v. City of Los Angeles ___ F.2d ___ (9th Cir. 1991) 3, 5, 9 19, 21, 23

Berman v. Parker (1954) 348 U.S. 26 4, 5, 13

Casella v. City of Morgan Hill (1991) 230 Cal.App.3d 43, 280 Cal.Rptr. 876 3

FCC v. Florida Power Corp. (1987) 480 U.S. 245 17

First English Evangelical Lutheran Church v. County of Los Angeles (1987) 482 U.S. 304 2, 11, 23, 24

Goldblatt v. Hempstead (1962) 369 U.S. 590 18, 20, 22

Hall v. City of Santa Barbara 833 F.2d 1270 (9th Cir. 1986) 3

Hawaii Housing Authority v. Midkiff (1984) 467 U.S. 229 4, 5, 13

Hodel v. Irving (1987) 481 U.S. 704 11, 15, 16, 26

	Page
Hoshour v. County of Contra Costa (1962) 203 Cal.App.2d 602, 21 Cal.Rptr. 714	12
Kaiser Aetna v. U.S. (1979) 444 U.S. 164	15-17, 24, 27
Keystone Bituminous Coal Assn. v. DeBenedictis (1987) 480 U.S. 470	25
Loan Assn. v. Topeka (1875) 87 U.S. (20 Wall.) 655	29
Loretto v. Teleprompter Manhattan CATV Corp. (1982) 458 U.S. 419	15-17, 27, 28
Nectow v. City of Cambridge (1928) 277 U.S. 183	18, 20
Nollan v. California Coastal Commn. (1987) 483 U.S. 825	2, 15-18 20, 24, 27, 28
Oceanside Mobilehome Park Owners' Assn. v. City of Oceanside (1984) 157 Cal.App.3d 887, 204 Cal.Rptr. 239	3
Penn Central Transp. Co. v. City of New York (1978) 438 U.S. 104	15, 18, 20 22, 24, 25
Pennell v. City of San Jose (1988) 485 U.S. 1	26

	Page
Pennsylvania Coal Co. v. Mahon (1922) 260 U.S. 393	24
Pinewood Estates of Michigan v. Barnegat Township Leveling Bd. 898 F.2d 347 (3d Cir. 1990)	3, 4, 19, 20
Ruckelshaus v. Monsanto Co. (1984) 467 U.S. 986	14-16, 25
U.S. v. Cors (1949) 337 U.S. 325	10
U.S. v. Security Indus. Bank (1982) 459 U.S. 70	15
Webb's Fabulous Pharmacies, Inc. v. Beckwith (1980) 449 U.S. 155	14
Winger v. Aires (Pa. 1952) 89 A.2d 521	14
Yee v. City of Escondido (1988) 224 Cal.App.3d 1349, 274 Cal.Rptr. 551, *cert. granted*	3, 4, 18

Statutes

California Civil Code:	
§798.55	8
§798.56	8
§798.74	8

Page

Constitution

United States Constitution 2-4, 6, 11, 15
Fifth Amendment 18, 23, 27, 29, 30

Publications

Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law* (1967) 80 Harv. L. Rev. 1165 10

Tribe, *American Constitutional Law* (2d ed 1988) §9-5 17

Miscellaneous

Escondido Municipal Code, Art. V., §29-103 8

California Dept. of Housing & Community Dev., *Mobile Home Parks in California — a Survey of Mobile Home Park Owners Pursuant to S.B. 1835* (1986) 2

California Dept. of Housing & Community Dev., *Mobilehome Parks in California: a Survey of Park Operators and Tenants* 22

No. 90-1947

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1991

JOHN K. YEE and IRENE S. YEE, et al.,
Petitioners,
vs.
CITY OF ESCONDIDO,
Respondent.

BRIEF *AMICUS CURIAE* OF CALIFORNIA MOBILEHOME PARKOWNERS ALLIANCE IN SUPPORT OF PETITIONERS

The California Mobilehome Parkowners Alliance has received the consent of the parties to file this brief as *Amicus Curiae* in support of the Petitioners and has filed the letters of consent with the Clerk of this Court.

INTEREST OF *AMICUS CURIAE*

The California Mobilehome Parkowners Alliance is a nonprofit corporation with more than 350 members throughout California. Most of the members are small "mom and pop" type businesses which own only one small mobile home park. Some are now subjected to ordinances like the Escondido ordinance before this Court, while others are threatened with enactment of such ordinances. All have a vital interest in the issues now before this Court.

Philosophical differences between landlords and tenants are hardly new. Nor are they strangers to this Court. However, the "solutions" now being devised by some municipalities (sometimes by city councils, sometimes — as here — by voter initiative measures voted in by the tenants themselves) to perceived problems in the mobile home park setting have gone beyond anything devised for any other residential rental setting. Compulsory, uncompensated transfers of interests in property are becoming commonplace.

The legality of transferring most of the indicia of ownership from mobile home park owners to mobile home park tenants is a serious issue. This *Amicus* is vitally concerned that an answer comporting with constitutional precepts be clearly given so that the state courts in California will understand it.[1]

A decision from this Court outlining appropriate standards could go far toward eliminating litigation which is as voluminous as it is contentious. While mobile homes represent only about 4.5% of California's housing stock,[2] they represent a disproportionately

---

[1] Not wishing to engage in overkill, it can nonetheless be said that being a property owner in California these days isn't the proverbial bowl of cherries. Even after this Court twice chastised the California judiciary in 1987 for its failure to understand the protection required by the Just Compensation Clause (*First English Evangelical Lutheran Church v. County of Los Angeles* [1987] 482 U.S. 304, 311; *Nollan v. California Coastal Commn.* [1987] 483 U.S. 825, 839), California courts continue to ignore the teachings of this Court and U.S. Courts of Appeals on Fifth Amendment issues, as graphically demonstrated by the conflicting decisions of the California courts and the Ninth Circuit Court of Appeals on the issue at bench.

[2] *See, e.g.*, California Dept. of Housing & Community Dev., *Mobile Home Parks in California — A Survey of Mobile Home Park Owners Pursuant to S.B. 1835* (1986) at 1.

large amount of the state's rent control litigation, as the recent conflicting decisions of the California appellate courts and the Ninth Circuit Court of Appeals attest. Part of the reason for that is the directly transferred property interest which only mobile home rent control ordinances impose on property owners. Resolution of the invalidity of that practice would eliminate much litigation.

SUMMARY OF ARGUMENT

In this direct conflict of decisions, which places the Third and Ninth Circuit U.S. Courts of Appeals on one side[3] and the California state courts on the other,[4] there is one thing on which all courts seem agreed: the combined effect of the type of mobile home rent control regulations now before this Court create a direct transfer of property and redistribution of wealth from the owners of mobile home parks to their tenants.

In holding that such regulations *could* violate the Fifth Amendment, the Third Circuit concluded:

> ". . . the effect of the law is to transfer the interest, without compensation, from the landlords to the tenants. . . . [The landlords] receive nothing at all

---

[3] *Pinewood Estates of Michigan v. Barnegat Township Leveling Bd.* (3d Cir. 1990) 898 F.2d 347; *Hall v. City of Santa Barbara* (9th Cir. 1986) 833 F.2d 1270; *Azul Pacifico, Inc. v. City of Los Angeles* (9th Cir. 1991) __ F.2d __.

[4] *Yee v. City of Escondido* (1988) 224 Cal.App.3d 1349, 274 Cal.Rptr. 551, *cert. granted* [the case at bench]; *Casella v. City of Morgan Hill* (1991) 230 Cal.App.3d 43, 280 Cal.Rprt. 876; *Oceanside Mobilehome Park Owners' Assn. v. City of Oceanside* (1984) 157 Cal.App.3d 887, 204 Cal.Rptr. 239.

> for the taking of the alienable physical property interest vested in their tenants." (*Pinewood*, 898 F.2d at 353)

Almost simultaneously, while reaching the opposite legal conclusion and holding that such regulations *do not* offend the Fifth Amendment, the California Court of Appeal said in the case at bench:

> "No one can dispute that Escondido's rent control ordinance, like the ordinance in *Oceanside*, effects a transfer of value from landlords to tenants." (*Yee*, 224 Cal.App.3d at 1354)

The difference in approach is that the federal appellate courts have held that this redistribution of property transgresses the protection of the Fifth Amendment, while the California appellate courts have essentially said, "So what?"

The answer to that implicit question is the Fifth Amendment's Just Compensation Clause. Although this Court has permitted property and wealth redistribution schemes in the past, it has never done so unless the party whose property was being taken was compensated. Indeed, the presence of compensation has been the key to upholding such schemes. (*Hawaii Housing Authority v. Midkiff* [1984] 467 U.S. 229; *Berman v. Parker* [1954] 348 U.S. 26) As this Court put it in *Berman*, when explaining why it was permitting a forced transfer of property from one citizen to another through the government's coercive eminent domain power:

> "The rights of these property owners are satisfied when they receive that just compensation which the Fifth Amendment exacts as the price of the taking." (348 U.S. at 36)

In contrast to the teaching of *Berman* and *Hawaii Housing Authority*, what the City of Escondido has done in the guise of regulating mobile home parks is to:

- limit the rent which the landlord can charge (the "rent control" part of the ordinance);
- maintain that controlled rent level when old tenants leave and new ones arrive (a restriction known as "vacancy control"); and
- grant to the departing tenants the right to choose their replacements as tenants.

As a consequence of these multi-layered controls, the old mobile home (owned by the tenant) commands a substantial bonus price in the market (regardless of condition). That bonus is demonstrable and measurable in every mobile home market. For example, in a case that went to trial (in contrast to the case at bench, which was decided on pleadings alone), the following occurred:

> "One Mrs. Morrison . . . testified that she bought a coach in Azul Pacifico's park for $77,000 and immediately sold it for $5000 and had it removed from the pad. When asked why, she responded: 'The use of the land was what I paid for more than the place.' " (*Azul Pacifico*, __ F.2d at __)

That last thought bears repetition: "The use of the land was what I paid for . . ." Ordinarily, one would expect payment for "the use of the land" to be made to the owner of the land. However, under rent/vacancy

control the payment for "the use of the land" was made to the former tenant, not the owner of the land. Absent rent/vacancy controls like Escondido's, all the tenant had to sell was a mobile home coach which the buyer thought was worth almost nothing. Yet the price it commanded was substantial. The $72,000 difference[5] was the combined effect of rent control and vacancy control in the mobile home park context.

The combination of these elements is the key. Unless all are present, the Fifth Amendment problem that brought the Yees and their friends to court does not arise. That is what distinguishes this kind of mobile home rent/vacancy control from more routine rent control ordinances affecting apartments. The departing tenant owns a tangible, salable asset (the right to live in a rent controlled space) and a tangible, salable item on which to hang a price tag (the mobile home). Giving tenants the right to sell their occupancy in a controlled mobile home park transfers ownership and receipt of that price from the landlord to the tenant.

Absent this stringent combination of controls, the new tenant would pay the same overall price. He or she would simply pay it all to the landlord in rent, rather than paying part to the landlord and part to the departing tenant disguised as the purchase price for the mobile home.

The City, its allies, and the California courts focus on what they view as the needs and problems of mobile home park tenants. Neither the members of the California Mobilehome Parkowners Alliance nor, we suspect,

---

5 Please note that this $72,000 represents the windfall to a tenant on only one space in a large mobile home park. Multiplied by the entire park, the value of the property taken from the landlord is substantial.

Mr. and Mrs. Yee and their neighbors, are unsympathetic to the problems of their tenants. The members represented by this *Amicus*, for example, are not large, faceless, corporate bureaucracies out of touch with the real world. Most of these parks are small "mom and pop" operations.

The problem arises when simplistic solutions are chosen for complex problems; when, in haste, one-sided "cures" are devised. That aspect of the problem is accentuated in this case because the ordinance at issue was enacted by a citizen initiative, rather than City Council action. The mobile home park tenants of Escondido voted themselves a jackpot bonus. The means chosen by those tenants are now before this Court.

To meet their perceived needs, the mobile home tenants of Escondido have cast their net too broadly. They have transferred palpable interests in property from their landlords to themselves. Without compensation. That, the constitution forbids.

FACTUAL SUMMARY

The operative facts can be succinctly stated, as this case was decided below on the pleadings.

Mobile home park owners own the land on which the park is located and on which mobile home coaches are placed. The mobile home coaches themselves are owned by their occupants. Thus, while they are referred to as "tenants," they are tenants only with respect to the land. The tenants own their mobile homes. The "mobile" homes are mobile in little more than historic nomenclature. These are not the historic "trailers" that can be hooked on the back of the family station wagon and

driven off. These are substantial structures which need special (though not expensive) handling to move.

Escondido's mobile home rent control ordinance was enacted by citizen initiative. The voters of Escondido (of which far more are tenants than landlords) enacted these regulations for themselves.

The combined effect of state statutes and city ordinances on mobile home park owners in Escondido is that:

- the rental rate is controlled by the city (Escondido Munic. Code, Art. V., §29-103);
- the rental rate remains unchanged when an old tenant departs and a new one takes his or her place (Escondido Munic. Code, Art. V., §29-103);
- the departing tenant has the absolute right to decide who will buy his mobile home and be the new tenant (Cal. Civ. Code §798.74);
- when a tenant sells his mobile home and vacates the premises, the park owner must rent the pad to the mobile home purchaser (Cal. Civ. Code §798.74);
- the park owner must renew pad rental agreements (Cal. Civ. Code §§798.55, 798.56);
- the park owner may not terminate rental agreements except for sharply limited reasons (Cal. Civ. Code §§798.55, 798.56).

The upshot of this system, as the California Court of Appeal noted in this case, is that an interest in the real property is actually transferred — without compensation — from the property owner to the tenants. That interest is definable and marketable. It has measurable value. That value is captured by the tenant when he or she sells the mobile home (with its rent controlled location) to a successor.

Thus, the combined effect of these state and local restrictions is that two things have happened to the total amount which a landlord would be able to charge as rent in an uncontrolled world: (1) the amount of rent has an arbitrary upper limit placed on it; and (2) the departing tenant collects part of the remaining amount as a monumental windfall for selling his or her coach in the rent controlled park. This windfall payment to the tenants who happen to occupy mobile home parks at the time a rent/vacancy control ordinance is enacted, is unrelated to any interest which legitimately belongs to the tenant. It is related solely to the location of the parcel in a rent controlled park. But the value of the location belongs to the land owner, not the tenant. The size of this windfall is usually substantial, running to the tens of thousands of dollars per space. The illustration noted above, in which a tenant pocketed $72,000 as her windfall payment, is an exemplar of the scope of the property transfers effected by rent/vacancy control ordinances. As a generality, the trial court in *Azul Pacifico* found that the size of the windfall at that park averaged $20,000 per space. (*Azul Pacifico*, __ F.2d at __)

ARGUMENT

"THE POLITICAL ETHICS REFLECTED IN THE FIFTH AMENDMENT REJECT CONFISCATION AS A MEASURE OF JUSTICE." [6]

It is hard to improve on this Court's vintage words.[7] However, what the California courts have approved is the precise opposite of this Court's simple and fair summary of the Just Compensation Clause's mandate.

A
A Complete Takeover of Property Would Unarguably be a Taking

Perhaps, by contrast, a hypothetical can illustrate the reality facing owners of mobile home parks in California today.

Suppose that the City of Escondido decided that mobile home parks housed the city's poorest citizens and, to protect them from joining the ranks of the homeless, the city decided to acquire all mobile home parks to maintain as low income housing. To accomplish that, the city assembled the owners of Escondido's mobile home parks and informed them that the city was taking over the parks. A sort of *coup de park*. In exchange for

---

6 *U.S. v. Cors* (1949) 337 U.S. 325, 332.

7 Professor Michelman's expansion on that thought is worth noting: "any measure which society cannot afford or, putting it another way, is unwilling to finance under conditions of full compensation, society cannot afford at all." (Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law* [1967] 80 Harv. L. Rev. 1165, 1181)

title to their properties, the owners would receive contracts to manage the new city-owned parks and would be paid a salary based on a percentage of the rent collected. But the city would set the rent; the rental rates would change only when the city decided they could; funds for upkeep, insurance, and maintenance would have to come from the rents collected or money borrowed by the "managers," as the city would invest no money of its own; and the tenants could either remain in perpetuity or designate their successors in interest.

Had the City of Escondido actually commandeered title to the properties and placed it in the City's name, there is no doubt that a Fifth Amendment violation would have occurred. Property would have been taken for public use without any compensation changing hands. The acquisition of title would have made the taking obvious.

As this Court recently explained:

> ". . . government action that works a taking of property rights *necessarily* implicates the 'constitutional obligation to pay just compensation.' [Citation.]" (*First English Evangelical Lutheran Church v. County of Los Angeles* [1987] 482 U.S. 304, 315; emphasis added)

When legislation is enacted which takes property with no intent to provide compensation, the legislation is invalid. (*Hodel v. Irving* [1987] 481 U.S. 704)[8]

---

8 The statute in *Irving* was intended to solve a problem caused by intestate succession to miniscule Indian estates. In the process, however, the recognized property right of devise and descent was taken from current owners without any intent to pay for that taking. As a result, this Court struck down the statute.

How does the actual hijacking of title from the park owners in the hypothetical differ from what the Escondido ordinance actually did to these park owners? In only one meaningful way: In the hypothetical, the owners would be relieved of the dubious honor of paying taxes on the property, as they would no longer hold title to it. As the New York Court of Appeals put it in its classic exposition on the difference between overt and covert confiscation:

> "The only substantial difference, in such case, between restriction and actual taking, is that the restriction leaves the owner subject to the burden of payment of taxation, while outright confiscation would relieve him of that burden." (*Arverne Bay Constr. Co. v. Thatcher* [N.Y. 1938] 15 N.E.2d 587, 592)[9]

Aside from the taxation issue, the Escondido ordinance has stripped mobile home park owners of all useful indicia of ownership as effectively as if refugee Party apparatchiks from eastern Europe had taken over the town and "socialized" it. Hyperbolic as this may sound, it is the reality. Rent/vacancy control has reduced the ownership of a mobile home park in Escondido to something akin to a public utility, where all decisions are made by the government and the titular owners of the properties have lost not only control over what they can charge and who they can rent to, but have

---

9 Similarly, an older California case characterized the impact of overly stringent regulation as leaving the property owners "nothing . . . but bare ownership and the burden of taxation." (*Hoshour v. County of Contra Costa* [1962] 203 Cal.App.2d 602, 603, 21 Cal.Rptr. 714)

been compelled to transfer substantial financial interests to their tenants with no compensation whatever.

B
A Compelled Transfer of a Recognizable Interest in Property is a Taking

As noted earlier, this Court approved Hawaii's plan for land reform and its use of the power of eminent domain to accomplish the breakdown of a feudal land tenure system (*Hawaii Housing Authority v. Midkiff*), and also approved the concept of urban redevelopment and its use of the power of eminent domain to assemble large tracts of land for resale to developers who would redevelop decayed city cores (*Berman v. Parker*).

In neither case, however, was there any doubt that compensation was a key element in the package. Indeed, the entire discussion in *Hawaii Housing Authority* was directed at the "public use" issue because, as the unanimous opinion put it, "we assume for purposes of these appeals that the weighty demand of just compensation has been met . . . ." (467 U.S. at 245) Absent this Court's ability to make that crucial assumption, the land title reform system which compelled the transfer of fee simple title from landlords to tenants could not have passed constitutional muster.

Nor is this surprising. The extent of the power of eminent domain has been described in terms more suited to breathless ingenues than judges :

> "The power of eminent domain, next to that of conscription of man power for war, is the most awesome grant of power under the law of the land."

(*Winger v. Aires* (Pa. 1952) 89 A.2d 521, 522)

When recognized property interests are compulsorily transferred from a private citizen on orders from the government, compensation is mandated:

> "This Court has stated that a sovereign 'by ipse dixit, may not transform private property into public property without compensation . . . . This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent.' " (*Ruckelshaus v. Monsanto Co.* [1984] 467 U.S. 986, 1012; quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith* [1980] 449 U.S. 155, 161.)

In the context at bench, there is no issue that such a transfer has taken place. Wordplay alone stands between these mobile home park owners and the property right which has been taken from them and given to their tenants. All of the courts to examine the mobile home rent/vacancy control ordinances involved here agree that property interests have been transferred. Given that judicial agreement about the actual transfer of interests from landlords to tenants, it is sophistry to deny that a taking has occurred and monstrous to deny the protection of those portions of the constitution designed to shield individuals from the hand of government when it overreaches.

C
A Taking Occurs When Government Commands a Property Owner to Stand Aside and Permit Permanent Physical Occupation of Property by Another

The Escondido scheme goes beyond mere wealth transfer. It commands property owners to permit permanent physical occupation of their property by strangers.

Physical invasion has always been viewed by this Court as a particularly obnoxious form of governmental intrusion, one which can more readily be seen as a Fifth Amendment violation. (*Penn Central Transp. Co. v. City of New York* [1978] 438 U.S. 104, 122; *Loretto v. Teleprompter Manhattan CATV Corp.* [1982] 458 U.S. 419, 436)

"Property" consists of many things. Indeed, the concept is so complex that this Court has repeatedly used the bundle of sticks analogy to help illustrate it, concluding that either the taking of an entire "stick" from the "bundle" or the taking of a part of all "sticks" in the "bundle" violates the Taking Clause of the Fifth Amendment.[10]

---

[10] *E.g., Kaiser Aetna v. U.S.* (1979) 444 U.S. 164, 176; *Loretto v. Teleprompter Manhattan CATV Corp.* (1982) 458 U.S. 419, 433, 435; *U.S. v. Security Indus. Bank* (1982) 459 U.S. 70, 76; *Ruckelshaus v. Monsanto Co.* (1984) 467 US 986, 1011; *Hodel v. Irving* (1987) 481 U.S. 704, 716; *Nollan v. California Coastal Commn.* (1987) 483 U.S. 825, 831.

The "sticks" obviously affected here are the right to exclude others from one's property, the right to possession of one's property and, because of the wealth transfer aspects of the ordinances, the right to alienate one's property.

One "stick" which has received special protection from this Court has been the right of the property owner to exclude others from his property. This Court has repeatedly referred to the right to exclude others as ". . . one of the most essential . . ."[11] and ". . . most treasured strands in an owner's bundle of property rights."[12]

Moreover, the Court has been particularly protective against governmental actions which permit strangers to invade the property of others:

> "This is *not* a case in which the Government is exercising its regulatory power in a manner that will cause an *insubstantial devaluation* of petitioners' private property; rather, the imposition of the navigable servitude in this context will result in *an actual physical invasion* of the privately owned marina." (*Kaiser Aetna*, 444 U.S. at 180; emphasis added; *see also Loretto*, 458 U.S. at 436)

Like *Kaiser Aetna*, this case does not involve "insubstantial devaluation" of property. The actual physical transfer of interests effected by the rent/vacancy control ordinance causes injury to the park owners which is measured in tens of thousands of dollars *per space*.

This Court later explained its rule as affording protection to a property owner against "an interloper with a

---

11 *Kaiser Aetna*, 444 U.S. at 176; *Loretto*, 458 U.S. at 433; *Ruckelshaus*, 467 U.S. at 1011; *Irving*, 481 U.S. at 716; *Nollan*, 486 U.S. at 831.

12 *Loretto*, 458 U.S. at 435.

government license." (*FCC v. Florida Power Corp.* [1987] 480 U.S. 245, 253)[13] That analogy seems apt here, where the Escondido ordinance permits — or, more properly, requires — an unending stream of strangers to occupy the mobile home parks.

Coerced acceptance of physical invasion is enough — by itself — under this Court's precedents to find a taking. In fact, however, the Escondido intrusion may be qualitatively worse than the others already condemned by this Court. For here we are not talking about boats on a waterway (*Kaiser Aetna*) or strollers on a beach (*Nollan*) or wires in a building (*Loretto*). Here, we are talking about living quarters. The landlords have lost all ability to determine who will live in their parks. That control has shifted to tenants who no longer have any particular interest in who will live in the parks, because it is a power exercised only when they are departing.

THE KIND OF MOBILE HOME RENT CONTROL ORDINANCES BEFORE THIS COURT FAIL TO SUBSTANTIALLY ADVANCE A LEGITIMATE STATE INTEREST

Much of the history of litigation involving the Bill of Rights has been over the way that governmentally chosen means fit with the governmentally sought ends. This Court has long been concerned that, to be valid, it is necessary for municipal land use regulations to substantially advance legitimate state interests. The reason

---

13 Or, as Professor Tribe colorfully expressed it, ". . . government-invited gatecrashers . . ." (Tribe, *American Constitutional Law* [2d ed 1988] §9-5 at 602)

has been to ensure that such regulations comport with the fundamental protections of the Fifth Amendment rights of those being regulated. These concerns began at least as early as this Court's 1928 decision in *Nectow v. City of Cambridge* (1928) 277 U.S. 183, 187-188 and have continued through the 1962 decision in *Goldblatt v. Hempstead* (1962) 369 U.S. 590, and the 1978 decision in *Penn Central Transp. Co. v. City of New York* (1978) 438 U.S. 104, 127 to the 1987 decision in *Nollan v. California Coastal Commission* (1987) 483 U.S. 825, 834 fn 3, 841.

Nollan also emphasized that, particularly "where the actual conveyance of property" is involved (483 U.S. at 841) a more precise quantum of scrutiny of the government's rationale is required than the traditional "rational basis" rubric would afford (483 U.S. at 834, fn 3).

Here, the California Court of Appeal put the issue starkly. It acknowledged that the Escondido ordinance "... effects a transfer of value from landlords to tenants." (*Yee*, 224 Cal.App.3d at 1354) However, it concluded that, because the ordinance could be justified by a rational purpose, and Mr. and Mrs. Yee's taking claim was based solely on that forced transfer,[14] there was no unconstitutional "taking" of what was plainly "taken" from them. (*Yee*, 224 Cal.App.3d at 1354)

The question addressed in this section is whether this stringent combination of Escondido requirements is

---

[14] One should be able to presume — at least in the present procedural posture of a case dismissed on the pleadings — that Mr. and Mrs. Yee pursued a narrow issue because the law on that issue was clear: when property is transferred, there must be compensation. That being the case, there was no need for the Yees to jump through the numerous procedural hoops placed in the path of those who seek compensation for other types of regulatory takings.

rationally needed to advance any legitimate state interest?[15] Examination of the way that rent/vacancy control operates at mobile home parks will demonstrate that there is no need for such radical measures to accomplish any legitimate state goals.

A
Rent/Vacancy Control Harms the Park Owner and Does Not Protect the Incoming Tenant

The park operator owns the land. He generally provides pads and connections for gas, electricity, and water. The tenant purchases his own mobile home, either new or, more often, from a departing tenant. When rents are controlled (*i.e.*, artificially restrained by the government at less than their market level would otherwise be) and there is *no* vacancy control, then the property owner has the ability, when the tenants move, to raise the rent of individual spaces to their market level from the artificially low controlled level. Future increases are then controlled.

But when you add vacancy control to a mobile home park, the departing tenant obtains a windfall: he gets not merely the market value of his personal property, *i.e.*, the mobile home (to which he is entitled), but also a very large premium (tens of thousands of dollars for each space) above that value which represents the value of the location of his mobile home in a rent-controlled park with the controlled, below market, rent already set. (*Pinewood*, 898 F.2d at 353; *Azul Pacifico*, __ F.2d at __)

---

[15] This issue is separate from the physical invasion issue. A holding that the physical invasion, by itself, violates the Just Compensation Clause, as this *Amicus* believes it does, obviates the need for this kind of ends and means analysis.

That result does not comport with the *Nectow / Goldblatt / Penn Central / Nollan* requirement that the governmental action substantially advance a legitimate state interest. Certainly not in the extreme form present in the Escondido initiative ordinance.

The general purpose of vacancy control is said to be to protect the incoming tenant from exorbitant rent increases. In an apartment building, where the old tenant is not selling the apartment unit to the incoming tenant, vacancy control can serve its purpose. The new tenant's cost is the controlled rental rate.

Under regimes like Escondido's, however, the new tenant receives no protection. While the rent may be limited by the control ordinance, nothing restricts the price which the departing tenant can demand for the old mobile home which sits on the rent controlled pad. (*Pinewood*, 898 F.2d at 353)[16] As the Ninth Circuit Court of Appeals analyzed it:

> "[V]acancy control does not help incoming tenants in the case of mobile homes. The coach buyer will pay the same effective rent for the pad whether or not the landlord is permitted to raise the rent at vacancy. To the potential buyer, the total product — housing — is the relevant cost; how that cost is allocated between rent for the pad and mortgage payments on the coach is largely irrelevant. For example, a buyer who can afford to spend $1000 each month on housing is indifferent between a coach with a $500 mortgage payment on a $500 pad and one with an $800 payment on a $200 pad." (*Azul Pacifico*, __ F.2d at __)[17]

Thus, assuming that the protection of *incoming* tenants from increased occupancy costs is a legitimate state interest, the Escondido ordinance does not substantially advance that interest. Indeed, it causes that interest actual harm.

B

Rent/Vacancy Control is Not Needed to Protect the Departing Tenant

The only other interest which such an ordinance might be said to serve is the protection of *departing* tenants' ability to obtain the fair market value of their mobile home coaches on sale to new tenants. Without vacancy control, it has been suggested that it would be possible for the landlord to raise the rent for the incoming tenant not merely to the "market" value of an empty pad, but to a level above that value sufficient to deter the incoming tenant either from purchasing the old coach from the departing tenant or from purchasing it at its full, Blue Book value.

---

16 In *Pinewood*, the Third Circuit Court of Appeals commented on the irony in restricting only the rent but not the price of the coaches. (898 F.2d at 353 fn 9)

17 Please note that the ordinance at bench is substantially more restrictive than the Los Angeles ordinance which was struck down in *Azul Pacifico*. When pad tenancy changed hands, the *Azul Pacifico* property owners *were permitted to increase the rent either by 10% or to the highest rent charged for a comparable pad.* (__ F.2d at __) Here, in stark contrast, NO rent increase could be made without city permission.

There is an argument that this asserted concern for the departing tenant ignores the fact that there is an inflated element in what some see as the "value" of the coach which, in reality, originated as the uncompensated taking from the landlord of an interest in the location of the coach. If that is true, as this *Amicus* believes the evidence would show were this case permitted to go to trial, then the departing tenant is in no need of protection, as his only threatened "loss" in value was not legitimately his to begin with.

Assuming, *arguendo*, that there is a legitimate state interest in protecting the departing tenant, the solution devised by Escondido fails to pass constitutional muster because it goes far beyond what is necessary.

Let's return, for a moment, to the Ninth Circuit's example of a tenant with $1000 per month to spend on housing. If the Blue Book value of the coach is the capitalized value of $400 per month, but the landlord raises the pad rental to $700 per month, then the new tenant has only $300 per month to pay for the coach.[18]

So, assuming that *some* protection for departing tenants would be justified, the question before this Court is whether the Escondido solution complies with this Court's standards of constitutionality. In *Goldblatt* and *Penn Central* this Court said that "a use restriction on real property may constitute a 'taking' if *not reasonably necessary* to the effectuation of a substantial public purpose . . . ." (*Penn Central*, 438 U.S. at 127; emphasis

---

[18] In reality, this is an unlikely event. The cost of moving a mobile home is measured in the low hundreds of dollars. (*See* California Dept. of Housing & Community Dev., *Mobilehome Parks in California: A Survey of Park Operators and Tenants* at 49.) Thus, if the park owner raised the pad rental too high, the tenant could, at minimal cost, simply move to another location.

added). Therefore, careful examination of the Escondido ordinance is needed to determine whether this ordinance is "reasonably necessary" for the job. Put another way, the question is whether the city could accomplish legitimate goals in a manner which is less intrusive on the rights of the park owners.

The Escondido ordinance uses a cannon where a fly swatter would do. Rather than confiscating property interests from landlords and providing windfalls for those tenants fortunate enough to be living in the mobile home parks when the initiative measure was passed, there are manifold ways to protect the departing tenants.

For example, the Los Angeles method of modified vacancy control discussed in *Azul Pacifico* might be used. In Los Angeles, the landlords are permitted to increase rents when tenancy changes by the lesser of 10% or the price at which vacant pads are rented in the park.

Or administrative redress could be provided. All rent control ordinances (Escondido's included) establish an administrative system for the processing of requests for rent increases. That system could also hear complaints from new tenants who believe they are being overcharged.

Undoubtedly other potential solutions, each far less intrusive on the rights of the mobile home park owners but equally effective at protecting the rights of departing tenants (other than their windfall profit "rights") could be devised.[19] The point here is that the Escondido

---

[19] Thus, assuming, *arguendo*, that Escondido had a valid goal in mind when it enacted the scheme at bench, neither that validity nor the city's reasonableness or good intentions would save the ordinance if it authorizes the taking of private property for public use without compensation. As this Court held in *First English*, the Fifth

(continued)

ordinance casts its net too broadly. In the guise of resolving a relatively minor problem, it has made a fundamental change in the ownership of mobile home parks, forcefully transferring an interest in the landlords' property to their tenants. That property transfer is not needed to protect the legitimate interests of departing tenants. If Escondido believes that the idea is otherwise worthwhile then, as this Court put it in *Nollan*, ". . . it must pay for it." (483 U.S. at 842)

HOW FAR IS "TOO FAR"?

Whether one views this mobile home rent control/vacancy control situation as a physical occupation (as the Third and Ninth Circuit Courts of Appeals have done) or as a regulatory matter (as the California appellate courts have done), there is a minimum threshold beyond which this Court has not permitted government to go. From 1922's *Pennsylvania Coal Co. v. Mahon* (1922) 260 U.S. 393, 415, through 1987's *First English*, 482 U.S. at 316, this Court has held consistently that the focal point in takings litigation is to determine how far the government action goes, because if it goes "too far," it is a taking which requires compensation.

This Court has also consistently refused to develop any precise template or formula for determining the location of that line, opting instead for "ad hoc factual" inquiries in each case. (*E.g., Penn Central Transp. Co. v. City of New York* [1978] 438 US 104, 124; *Kaiser*

(fn. continued)
Amendment requires ". . . compensation in the event of *otherwise proper interference* amounting to a taking." (482 U.S. at 315; emphasis added; Court's emphasis omitted.)

Aetna v. U.S. [1979] 444 US 164, 175; *Ruckelshaus v. Monsanto Co.* [1984] 467 US 986, 1005.)

Thus, to try to locate the line separating "ok" from "too far," a brief examination of some of this Court's decisions on both sides of the line may be of service.

In *Penn Central*, the New York landmarks protection ordinance required maintenance of Grand Central Terminal and precluded some development. However, it did not interfere with the way the owners of the property had traditionally used it, did not preclude future additional development, did not prevent the owners from making a profit on their investment, and offered "transferrable development rights" as compensation.

Penn Central goes on the "ok" side of the line. Thus, if mobile home rent/vacancy controls permitted the park owners to continue to manage as they had in the past, and offered some form of compensation in exchange for any property taken, such an ordinance would not be a taking.

In *Keystone Bituminous Coal Assn. v. DeBenedictis* (1987) 480 U.S. 470, the Pennsylvania anti-subsidence statute required coal mine operators to leave enough coal in the ground to support the surface of the land. It therefore reduced the amount of coal which could be extracted from the mines. However, in the overall context of the coal mining business, the amount of coal required to be left in the ground was minimal (some had to be left anyway simply to support the tunnels), the mine owners retained control over the use of their facilities, and the regulations did not interfere with the profitability of the mines.

Keystone also goes on the "ok" side of the line. Thus, if mobile home rent/vacancy controls had only a *de*

minimis economic impact and left control over the parks in the hands of the owners, there would be no taking.

Pennell v. City of San Jose (1988) 485 U.S. 1 involved an apartment rent control ordinance. Declining to reach an intriguing issue about using the tenant's ability to pay as a factor in setting rental rates (because it had not yet been applied), the ordinance was upheld against a general facial attack because, while the ordinance regulated the way the landlords could do business, it did not physically interfere with them or deprive them of the ability to control the use of their property.

Pennell is on the "ok" side of the line. Thus, if mobile home rent/vacancy controls do not physically interfere with, or deprive the park owners of the ability to control the use of their property, there would be no taking.

In *Irving*, the Congressional enactment was designed to eliminate a massive bookkeeping problem for the Bureau of Indian Affairs. Intestate transfer of interests in Indian estates had evidently so divided the interests in thousands of properties that the interests were virtually worthless. They were certainly worth less than the administrative cost of keeping track of them. So Congress decreed that such miniscule estates could not pass by intestacy. Upon a death intestate, the decedent's interest would escheat to his or her tribe. However, although the interference appeared almost nonexistent, this Court held that it destroyed the recognized "stick" in the property rights bundle of the dying Indian called the right to devise property — even if only by operation of law. The statute was struck down because of the coerced and uncompensated taking of that property interest.

The statute in *Irving* went "too far." Thus, if mobile home rent/vacancy controls remove a recognizable stick from the property rights bundle, there would be a taking.

In *Kaiser Aetna*, the Corps of Engineers had already granted a permit to private parties to develop a marina. They did so. After the fact, the Corps decided to require public access to the marina, thus interfering with the owners' exclusive possession and granting an easement to the public to use the property. This Court held that such action would be a taking.

Kaiser Aetna is on the "too far" side of the line. Thus, if mobile home rent/vacancy controls interfere with the park owners' right to exclusive possession and grant an interest in the property to others, there would be a taking.

Loretto involved cable TV access to apartment buildings. A New York statute purported to require landlords to permit cable companies to install cables. Notwithstanding the miniscule nature of the invasion,[20] this Court concluded that *all* permanent physical occupations are takings *per se*. This forced transfer of an interest in the property could not be squared with the Fifth Amendment.

Loretto is on the "too far" side of the line. Thus, if mobile home rent/vacancy controls permit permanent physical occupation by third parties, there would be a taking.

Nollan involved a California Coastal Commission condition to a building permit, requiring the dedication of an easement along the sandy beach 1/3 of the property. The condition would have opened the property to continuous physical invasion by unknown numbers of unknown members of the general public. This Court struck down the condition.

---

20 This Court characterized the space occupied as "no bigger than a breadbox." (458 U.S. at 438, fn 16)

Nollan, follows *Lorretto* and is on the "too far" side of the line.

Attempting to locate a "takings line" by graphing those points yields some guidance and insight.

First. If the government action merely regulates the way business can be conducted, without transferring interests to others, without invading the premises, and without interfering with profits, then no taking occurs.

Second. If the property owner remains in substantial control of his or her property, then there is no taking.

Third. If there is physical invasion of the property, there is a taking.

Fourth. If there is the transfer of an interest in property, there is a taking.

Attempting to place the case at bench on this graph seems relatively easy. Because of the conceded transfer of property interests from the property owners to their tenants, the dispossession of the property owners, and the subjection of their property to continuous occupation by strangers who have bought their right of occupancy from other strangers, the facts of this case are on the "too far" side of the line. In fact, this case is quite far over the line. At this point, it bears reiterating that:

- all courts agree that a definite, cognizable, and marketable interest in property was transferred; and
- no compensation was paid to the landowners for this coerced property transfer.

Under this Court's clear precedents, that cannot happen. If a non-governmental entity attempted any such action, it would immediately be condemned as piracy. It is no less so when done with the imprimatur of government.

This initiative measure was a high-handed land grab. Nothing more. It merits this Court's constitutional censure.

CONCLUSION

And so we return to basics:

> "It must be conceded that there are such rights in every free government beyond the control of the State. A government which recognized no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. It is true it is a despotism of the many, of the majority, if you choose to call it so, but it is none the less a despotism." (*Loan Assn. v. Topeka* [1875] 87 U.S. [20 Wall.] 655, 662)

The Fifth Amendment's Just Compensation Clause was designed to stand as a bulwark against tyrannical majorities. Mobile home park owners are in need of that protection today. Here, the citizens of Escondido (far more of whom are tenants than landlords) proposed and adopted an initiative measure by which they voted themselves a windfall bonus at the expense of mobile home park owners. Property interests were concededly transferred when the final votes were counted.

At bottom, the core of the Fifth Amendment is its insistence on fairness. Mobile home park owners have not been the recipients of fair treatment by the California

courts. It is time for this Court to send an unmistakable message that the Fifth Amendment means what it says and that it applies even in California.

Dated: November 25, 1991.

Respectfully submitted,

MICHAEL M. BERGER
Counsel of Record
of BERGER & NORTON

PROFESSOR GEORGE LEFCOE
UNIVERSITY OF SOUTHERN
CALIFORNIA LAW CENTER.

JOEL G. HIRSCH
LAW OFFICES OF
DAVID A. LAPIN

Attorneys for Amicus Curiae
California Mobilehome Parkowners
Alliance